SUPREME COURT U.S.
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Supreme Court of the United States.

UNITED STATES.

No. 80. *vs.*

S. D. PINSON,

Ex'x of R. A. PINSON, dec'd.

BRIEF FOR DEFENDANT IN ERROR.

ESTES & ELLETT, For Deft. in Error

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The only question in this case is, whether the document offered in evidence by the United States was properly excluded from the jury.

The action was brought against the executrix of one of several sureties on the official bond of Miles H. Morris, formerly a purser or paymaster in the U. S. Navy, to recover a balance claimed to be due for clothing and money received by him as such officer, and not properly disbursed or accounted for. The account ended in 1861, and the suit was not brought against this lady until 1875.

The document offered in evidence purports on its face to be, *First*, an "Abstract of expenditures of Miles H. Morris, Paymaster of U. S. S. Vandalia;" (Record p. 7.) and, *Secondly*, an "Abstract of expenditures of Miles H. Morris, Paymaster U. S. S. Seminole." (Record p. 11.)

After these "abstracts of expenditures" there follow, *First*, what purports to be a "*statement of the account of M. H. Morris, purser of U. S. S. Vandalia, from May* 19, 1858, *to January* 6, 1860, (Record p. 13); and, *Secondly*, a "*statement of the account of Miles H. Morris, paymaster U. S. S. Seminole, from May* 1, 1860, *to March* 12, 1861, (Record p. 16.)

There are also "supplementary statements" on pages 20 and 21, and a "*reconciling statement*" on page 22.

Entries are made in these "abstracts" and "statements," under the several general headings of "Pay of the Navy," "Provisions," "Increase and Repair," "Clothing," etc.

The character of the items making up the grand totals may be illustrated by the following examples, to-wit:

To requisition 5706	$5000 00
C. C. Jackson, P'r	1349 75
Jos. Smith, N. A., 1917	18 00
Premium or Bills on Barings	91 12
do do N. Dept	200 00
S. Stores of Ball. and 10 pr. ct.	66 82
Balance 2451	5863 05

This document is authenticated, first, by the certificate of the Secretary of the Treasury to the official character of W. B. Moore, as Deputy Fourth Auditor; and, secondly, by the certificate of W. B. Moore, Deputy Fourth Auditor, to the effect that the document itself is a copy of originals on file in his office.

The first of these certificates is in the following form, to-wit: (Record p. 6.)

TREASURY DEPARTMENT.

Be it remembered, that William B. Moore, Esq., who certified the annexed transcript, is now, and was at the time of doing so, Deputy Fourth Auditor of the Treasury, and that full faith and credit are due to his official attestations.

In testimony whereof, I, B. H. Bristow, Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this Department, at the City of Washington, this 24th day of July, in the year of our Lord 1875.

B. H. BRISTOW,
Secretary of the Treasury.

[SEAL.]

The other certificate, the one made by Moore, is in the following form: (Record 6 and 7.)

TREASURY DEPARTMENT,
FOURTH AUDITOR'S OFFICE,
July 23, 1875.

Pursuant to an Act of Congress to provide for the prompt sett'ement of public accounts, approved 3d of March, 1817, I, Wm. B. Moore, Deputy Fourth Auditor of the Treasury Department, do hereby certify that the annexed transcripts *are true copies of the originals on file in this office.*

WM. B. MOORE,
Deputy Auditor.

The Act of Congress of March 3, 1797, (1 U. S. Stat. at Large, 512; Conkling's Tr. 377,) which first made these transcripts from the books and proceedings of the Treasury competent evidence against delinquents, required them to be certified by the Register. But by the Act of March 3, 1817, sec. 11, (3 U. S. Stat. at Large, 367; Conkling's Tr. 378,) the above provision was extended, in regard to the accounts of the War and Navy Departments, to the *Auditors* respectively charged with the examination of those accounts, and certificates signed by them were made of the same effect as that directed to be signed by the Register.

This Act of 1817 was repealed by the Revised Statutes of 1874, and the following provision was substituted in respect to accounts in the War and Navy Departments, to-wit: "*A transcript from the books and proceedings of the Treasury Department, certified by the Auditors respectively charged with the examination of the accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence.*"

It is further provided, that "all copies of bonds, etc., when certified by the Register, or by the Auditor, as the case may be, to be *true copies of the originals on file*, and authenticated under the seal of the Department, *may be annexed to such transcripts*, and shall have equal validity," etc., as the originals.

There are several objections to the testimony offered in this case, which are quite fatal to its admissability.

I.

The certificate is not made by the Auditor, who alone is authorized to make it. The Act of Congress is explicit. The transcript must be certified *by the Auditor.*

The Deputy Auditor has no such authority. The office of Deputy Auditor was created by the Act of March 3, 1875, chap. 130.

This Act, on page 397, makes an appropriation for the salary of a Deputy Auditor, in the office of the Fourth Auditor. On the next page of the same Act (p. 398, at foot) it is enacted "That the duties " heretofore *prescribed by law and performed by the chief clerks*, in " the several Bureaus named, shall hereafter devolve upon and be " performed by the several Deputy Comptrollers, *Deputy Auditors*, " etc."

So, all that was done was to change the name of the Chief Clerk to that of Deputy. The duties and powers of the *Deputies* are made the same as those that were "prescribed by law" for the *Chief Clerks*.

Did the Chief Clerks possess the power to certify these transcripts?

Referring to the Revised Statutes, we find, on page 38, that there shall be, in the office of the Fourth Auditor, *one Chief Clerk*.

Among the "Provisions applicable to all the Executive Departments," the powers and duties of the Chief Clerks are "prescribed by law." Rev. Stat. p. 27.

By Sec. 173 the Chief Clerks shall supervise the duties of the other clerks, and see that they are faithfully performed.

By Sec. 174, they are to take care that the duties of the other clerks are distributed with equality and uniformity, and to report any defects in the arrangement or dispatch of business.

These were the only duties of the Chief Clerks as "prescribed by law;" and these are the only duties of the Deputies who have succeeded them.

Whether the Chief Clerks, before the revision of the statutes, ever undertook to certify transcripts, in their own names, or otherwise, we have no information. But certainly since the revision, in view of this enumeration of their powers and duties, it is unreasonable to suppose that they have attempted to do so.

The Deputy Auditor is not authorized to act for the *Auditor* in the discharge of *his* duties, but only instead of the *Chief Clerk*, to perform *his* duties, as before prescribed by law.

It is certainly the settled opinion in the Departments, that it requires *special authority of law* to enable an officer *to act by deputy*.

In 3 Abbott's Nat. Dig. p. 352, ph. 62, (itself a work of some authority,) the following passage occurs:

"ACTING BY DELEGATE.—Heads of Departments or of Bureaus, or other certifying officers of the Government, *cannot certify by delegation*, unless when specially authorized so to do by act of Congress." Citing, Opinions of Attorneys General, vol. 7, page 594. See Dig. of Opinions of Att'ys Gen., page 33.

In accordance with this view, the Supreme Court of Tennessee held that where an office is created by statute, and no provision is made for the appointment of a deputy, the functions of the office can be performed only by the officer himself, in person.

Coffee vs. Tucker, 7 Hum. 49.

"A man cannot make his deputy in all cases, except the grant of the office justify him in it, and where it is to one, to execute *by deputy*, etc."

2 Jac. Law Dic. 251. Deputy.

1 Wharton's Law Lex. Deputy.

But, of course, it will not be pretended that the heads of departments or bureaus, at Washington, could, without some authority by act of Congress, discharge the duties of their offices by deputy.

In Smith vs. United States, 5 Peters, 291, the certificate of the *Secretary* was signed thus, "Edward Jones, Chief Clerk, for W. H. Crawford, Secretary of Treas.;" and the point was made that the Chief Clerk could not sign the Secretary's name; but this was held unimportant, as the *signature* of the Secretary was not required, the *seal* being the substantial thing, and that could be affixed by the Auditor.

In this case, great importance was attached by the District Attorney, in the court below, to the provisions of Sec. 178 of the Revised Statutes, page 27, as applicable to the point now in question.

That section provides that "in case of the *death*, *resignation*, *ab-* " *sence* or *sickness* of the chief of any bureau, (or of certain other " officers,) the assistant or *Deputy* of such chief or other officer, " shall, unless otherwise directed by the President, perform the " duties of such chief, or other officer, until a successor is appointed, " or such absence or sickness shall cease."

But this is a mere provision for the *pro tempore* discharge of the general duties of an office, during a vacancy, or in the absence of the incumbent. The officer performing the duties in such cases always describes himself as "acting"—thus, "Acting Secretary of State," or "Acting Fourth Auditor," and never professes to act in his subordinate character as chief clerk or deputy.

It is not pretended here that any vacancy existed in the office of Fourth Auditor, or that the incumbent was absent or sick. If such had been the case, Moore would have described himself as Acting Fourth Auditor, not as deputy.

But this section does afford a strong confirmation of our views in relation to the powers of the deputy to certify transcripts, for it clearly shows that it is only in case of the death, resignation, absence or sickness of the Auditor, that the deputy can perform the duties of his chief. The duty of certifying these transcripts being expressly devolved by law upon the "Auditor," it follows of necessity that it is only in case of his disability that it can be discharged by the deputy. So long as the Auditor is present and acting, the deputy only performs the functions formerly belonging to the chief clerk.

II.

But if the Auditor can make these certificates by his deputy, it is clear that the deputy must act *in the name of his principal.*

It is the *Auditor* that is authorized to make the certificate, not the deputy, as such. The act must be the act of the Auditor, and must purport to be so.

The deputy does not derive his appointment or his powers from the Auditor. His appointment comes from the President, through the head of the Department, and his powers and duties are prescribed by law. These cannot be enlarged or diminished by the Auditor.

In this case, it is "W. B. Moore, Deputy Auditor," who makes the certificate, and he professes to do so "pursuant to an Act of Congress" of March 3, 1817. He asserts the power, under that act, to make the certificate in his own name and right, as a power vested in *him* by virtue of *his* office. This is a great mistake.

It is a settled principle that whenever the deputy acts under the authority conferred on his principal, he must act *in the name of his principal.*

1 Bouv. Law Dic. p. 409, Deputy.
Crocker on Sheriffs, secs. 17, 39 and 531.
Watson on Sheriffs, 31, 32.
Hunt vs. Rousmanier, 8 Wheat, 174.
Clark vs. Courtney, 5 Peters, 349.

"A deputy of an office hath no interest therein, but doth all things *in his master's name*, and his master shall be answerable."

2 Jac. Law Dic. 252, Tit. Deputy.

Combe's case, 9 Coke, 73, 77, is always cited as the leading authority for the doctrine in question. In that case, "It was resolved that when any has authority to do an act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person, and therefore the attorney

cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority."

And again, "But if attorneys have power by writing to make leases by indenture for years, they can't make indentures in their own names, but in the name of him who gives them the warrant."

This principle is recognized in the report of Parker vs. Kett, in 12 Mod., 467, though in that case the two attorneys appeared in open court, and made the surrender in person.

Also in Frontin vs. Small, 1 Strange, 705.
Wilks vs. Back, 2 East. 142.
White vs. Cuyler, 6 T. R. 176.
Elwell vs. Shaw, 16 Mass. 42.
Sheldon vs. Dunlap, 1 Harr. N. J. 247.

And in 3 Salkeld, 252, it is said, "a constable is but a ministerial officer, therefore he may make a deputy, for he may be sick, and so not able to execute his office in person, but returns must be made *in the name of the immediate officer*, and so they must *in all ministerial offices*, but not in judicial."

In Tennessee, the Register of Deeds may certify copies by deputy, but it must be done in the name of the principal—thus, A. B., Register, by C. D., Deputy—or C. D., Deputy, for A. B., Register.

Cook vs. Hunter, 2 Tenn. 113.

III.

Again, the certificate of the Deputy Auditor purports to be made in pursuance of an Act of Congress approved March 3, 1817; whereas that act had been entirely repealed eighteen months before the date of the certificate, and section 886 of the Revised Statutes declared to be in force in lieu of it.

Rev. Stat. p. 1091, sec. 5596.

Besides, the Act of 1817 conferred no authority on the deputy, but upon the *Auditor* alone, to make the certificate. The office of Deputy Auditor was not created until nearly sixty years afterwards.

We do not say that it is necessary, in such cases, to recite the authority; nor that, where the authority is not recited, the act may not be upheld by reference to any sufficient authority which the party actually possessed. But where a particular authority is recited, and the act done is rested upon that sanction alone, if that authority is insufficient, the act must fall.

Sir Edward Clere's case, 6 Co. 17.
Parker vs. Kett, 1 Ld. Ray, 660.

IV.

The document is not authenticated by the seal of the Treasury Department.

The certificate of Moore is not under any seal. According to the case of Smith vs. United States, 5 Peters 293, the seal of the Department ought to have been affixed to *his certificate* by the *Auditor*, and no certificate by the *Secretary* was required at all. But the Secretary here certifies that Moore is Deputy Auditor, and he affixes the seal of his Department simply to authenticate his own certificate to the official character of Moore. The certificate made by Moore himself has no seal affixed, and is not authenticated by the seal of the Department, or otherwise.

The statute requires the "*transcript*" to be authenticated under the seal of the Treasury Department. Here, nothing is so authenticated but the fact that Moore is Deputy Fourth Auditor. It is only "in testimony *thereof*," that the seal purports to be affixed.

V.

The certificate itself does not conform to the act of Congress, but is fatally defective.

When copies are made evidence by statute, the mode of authentication prescribed must be strictly pursued.

Smith vs. United States, 5 Peters 293, 301.

2 Abbotts Practice, 133.

U. S. vs. Harrell, McAllister, 243.

The certificate in this case does not say that the accounts annexed are "*transcripts from the books and proceedings of the Treasury Department*," nor that they are *transcripts of anything*; but only that they are "*copies of originals on file in this office.*"

The difference is wide and palpable. It is the "*transcript from the books and proceedings*," that is made evidence; and, when circumstances require it, copies of original bonds, contracts, or papers, on file, may be "*annexed to such transcript.*" These copies are to be certified as true "*copies of originals on file*," before they can be annexed. But the transcript must be certified as a "transcript from the books and proceedings of the Treasury Department," otherwise it is not the thing made evidence by the Act of Congress.

The whole question was presented and discussed in the case of Smith vs. United States, 5 Peters 293, which we regard as determining the matter in favor of the defendant in error.

The certificate there was in the same form as in the present case, and it was held sufficient under the peculiar circumstances of that

case. It was stated in the bill of exceptions, that "a paper *purporting to be a transcript from the books and proceedings of the Treasury Department*," containing an account headed "Alpha Kingsley, late District Paymaster, in account with the United States," was offered in evidence, and was objected to on account of the form of the certificate. The paper itself was not contained in the bill of exceptions, but only this description of it.

Four of the judges thought the certificate substantially good. They connected the certificate of the Auditor with the above statement in the bill of exceptions, and considered that the certificate could only relate to the transcript offered in evidence, and that it sufficiently authenticated it. This construction, they thought, was strengthened by another statement in the bill of exceptions, that "a duly certified copy of the bond sued on was affixed," which showed that there were two certificates, one annexed to the transcript, and the other to the copy of the bond.

The other three judges thought that the manifest defects in the certificate could not be cured by reference to the statements of the bill of exceptions.

The opinion of the majority on this point did not pass into a judgment of the court; for the minority uniting with a minority on another point, the minorities thus joined, constituted a majority of the court.

It is evident that the whole court considered the certificate to be insufficient *in itself*, and that the only point of difference was as to whether it could be helped out by reference to the bill of exceptions. We might respectfully suggest that, on this point, the minority of the court had the best of the argument, especially in view of the rule stated, from which there was no dissent, that "where copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence, in derogation of the common law, but the judicial power is limited to the rule laid down."

But it is not necessary for us to do so, as our case does not require it. In our case there is no statement in the bill of exceptions that the paper offered "purported to be a transcript from the books and proceedings of the Treasury Department." The paper itself is set out at large, and it does not purport to be such transcript. On the contrary, it consists of copies of "abstracts of expenditures" and of "statements of accounts," the originals of which are on file in the Fourth Auditor's office.

In United States vs. Patterson et al., Gilpin's Rep. 44, which was a suit against the sureties of a supervisor of internal revenue, a statement very similar in form to the document produced in this case was offered in evidence by the United States. It purported to be a statement and adjustment of the account of the supervisor, made by the Auditor, certified by the Register, and authenticated under the seal of the treasury department. The form of the certificate of the Register is not given.

Judge Hopkinson ruled out the evidence, and quoting from the act of congress, that "a transcript from the books and proceedings of the treasnry, certified by the Register, and authenticated under the seal of the department, shall be admitted as evidence," says, "by which I understand that the whole accounts as they appear on the books: the elements out of which the reported balance is formed; together with all the proceedings which have been had concerning them, shall be certified and submitted to the court and jury, that they may judge whether the sum or balance for which the suit is brought, be fairly made up and is justly due. * * * A full transcript from the books containing the accounts, and also of the proceedings of the treasury in relation to them, in admitting or resisting disputed vouchers, charges, etc., are indispensable to these objects. * * * * The whole cause of controversy must be put into the possession of the court, as it exists in the treasnry department, and thereupon the court and jury will pass their judgment."

Our view is sustained to a certain extent by United States vs. Gaussen, 19 Wall. 198. That case was decided under the act of March 3, 1797, before the revision of the statutes; but the language of the 2d sec. of that act, to-wit: "a transcript from the books and proceedings of the Treasury," is preserved in sec. 886 of the Revised Statutes. It is expressly stated that no objection was made to the form or substance of the certificate, and the form employed is not shewn.

But the court clearly recognizes the rule so often before laid down, that it is only a "copy from the books" that is made evidence. The court say, "A transcript or a transcribing is substantially a copy. A copy *from* the books, and not of the books, shall be admissable in evidence. An extract from the books, a portion of the books, when "authenticated to be a copy," may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented, and the

credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed, as a condition of the admissability of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books."

These remarks are made with reference to the contents of the document itself, when properly certified in the form prescribed by the statute, as "a transcript from the books and proceedings of the Treasury:" but they clearly assume that whatever is produced and offered in evidence must be "authenticated to be a copy" from such books and proceedings.

The Act of 1825, Rev. Stat, sec. 889, allows, in civil suits against postmasters or contractors, "a statement of the account, certified by the Sixth Auditor, under the seal of his office," to be admitted in evidence.

Postmaster Gen'l vs. Rice, Gilpin, 554.

United States vs. Harrell, McAllister 243, was a case against a postmaster, under the act of 1825, and the question was as to the sufficiency of the "statement of account" offered as evidence.

The Judge says, "It has long since been decided by the Supreme Court that the legislature had the power to establish new rules of evidence, in derogation of the common law, by making such documents evidence. All that is required is that the mode of authenticating them, as prescribed by law, must be strictly pursued."

The clear distinction between sections 886 and 889 of the Revised Statutes, or between the original acts from which these sections were taken, is pointed out by the Judge, and the previous cases on the subject are stated and reviewed. The distinction is this. In cases arising under the postoffice laws, where civil suits are brought against postmasters or contractors, a "statement of the account," certified by the Sixth Auditor under the seal of his office, is made evidence. But in cases arising in the War and Navy Departments, such "statements" are not authorized, but there must be a "transcript from the books and proceedings of the Treasury Department," certified by the proper Auditor for the Department, under the "seal of the Treasury Department."

These very different provisions seem to have been strangely confused in making out the document that was produced and offered in evidence in this case.

VI.

The objections already considered go to the admissability of the whole document. But if these are insufficient to justify its exclusion, there are objections to its contents quite sufficient for that purpose.

It will be observed that the claim of the Government consists really of only two items, to-wit: balance under the head of "pay of the Navy," $2767.16, and balance under the head of "clothing," $570. The other item of $2586.34 is merely interest charged on the two other items.

There are items in the accounts amounting to greatly more than the sum sued for, of which such a transcript, if properly certified, would not be competent proof.

Examples have already been given of objectionable items of this description.

Many of the items are charged for "req'sn" (requisition), that is, we presume, for money or property, paid or delivered on the order or requisition of Morris.

He is also charged with sums of money, and with property, received by him from pursers, and Navy Agents, and other sources not specified, as N. J. R.'s, and with "premium on bills on Barings;" not coming to his hands through officers of the Treasury Department.

The Treasury transcript, if properly certified, is no proof of such items. Those not coming directly from the Department, but received from or through other disbursing officers or agents, cannot be proved by a transcript of the account, but must be established by the evidence on which the statement or charge was made. And the "*items*" must be given as they were acted upon by the accounting officers of the Treasury Department. Charges of "balances" from other accounts not copied are insufficient.

Conkling's Tr. 381, 382.
2 Abbott's U. S. Pr. 132, 133.
U. S. vs. Buford, 3 Peters, 12, 29.
Cox vs. U. States, 6 Peters, 172, 202.
U. S. vs. Jones, 8 Peters, 376, 383.
Hoyt vs. U. S. 10 How. 109, 132.
Bruce vs. U. S. 17 How. 437.
U. S. vs. Hilliard, 3 McLean, 324.

The case of U. S. vs. Edwards, 1 McLean 467, is precisely in point. The certified transcript contained several items, "amount-

ing to more than the balance claimed," which were charged as "balances" found due by the officers of the treasury department. No objection was made to the form of the certificate. Yet the transcript was held inadmissable as evidence in regard to these sums charged as "balances," because these items were not the evidence on which the accounting officers acted, but the result of their judgment on the accounts.

The same conditions exist in the present case. The charges contained in the account, of which such an account is not competent proof, greatly exceed the balance claimed by the suit. The transcript, being inadmissable as evidence in support of these charges, was properly rejected to that extent at least, whether the certificates were sufficient or not; and, inasmuch as there was nothing due to the United States after these charges were eliminated, the verdict and judgment in favor of the defendant, were correct.

In this case of Edwards, Judge McLean animadverts upon the fact that "the treasury officers seem to pay more regard to their own peculiar forms, than to the requisites of the law, or the decisions of the courts of the United States." This remark is peculiarly applicable in this case, where the treasury officers are found adhering to a form of certificate forty-five years after its condemnation in Smith vs. United States.

On the whole case, we trust the judgment will be affirmed.

ESTES & ELLETT,

FOR DEFT. IN ERROR.